UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MICHAEL TERPIN,

Plaintiff,

20-CV-3557 (CS)

-vs-

BENCH RULING

ELLIS PINSKY, et al.,

Defendants.
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United States Courthouse
White Plains, New York

Monday, August 30, 2021
10:45 a.m.

B e f o r e:

HONORABLE CATHY SEIBEL,
District Judge

A P P E A R A N C E S:

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THE DEPUTY CLERK: Judge, this matter is Terpin v. Pinsky. We have on the line representing Plaintiff Mr. Paul Blechner and Mr. Patrick McCarthy, and representing Defendant, we have Mr. Noam Biale. Our court reporter, Tabitha, is on and Ryan is on.

THE COURT: All right, good morning, everyone.

Let me remind the lawyers, if you say anything, the first word out of your mouth should be your last name. Please do not say "this is Paul Blechner for Plaintiff," just say Blechner. Don't worry about sounding impolite or anything. The court reporter needs to know right up front who is speaking and so do I, so, please, remember to say your last name first. If you forget, we're probably going to have to interrupt you and, of course, we don't want that.

Does either side have anything to add on the motion to dismiss that is not covered by the papers? All right, I'll take that as a no.

MR. BLECHNER: Paul Blechner, your Honor.

THE COURT: Go ahead.

MR. BLECHNER: I guess -- it was unclear entirely what the process was today and if you were going to allow any argument. If there are issues on which you presently intend to grant the motion to dismiss that come out of the reply brief, I would, I would ask for a brief opportunity to address them. I don't --

THE COURT: I don't do it that way. I don't tell you how I plan to rule. If there's anything you want to say that isn't covered by the papers, go right ahead.

MR. BLECHNER: All right, thank you, Your Honor.

Look, I guess -- I want to keep it brief, but I don't want to unnecessarily use any time that isn't necessary, and a lot of it is covered, but as I've been through the reply brief, you know, it strikes me that there is an effort to create a standard that doesn't apply in this case, in multiple respects.

With respect to the RICO claim, the Defendant repeatedly is referring to and speaking about 9(b), and the law is clear that 9(b), while it has some application, it may have some application in RICO claims, it does not apply to all allegations in all RICO claims, and what the courts have done in addressing, I think, what is an inherent tension between the liberality of pleading in RICO claims and a concern about RICO claims being misused in dressing up what I think are being referred to as run-of-the-mill fraud claims, the courts have addressed and dealt with that tension and focused on fraud allegations.

And I think the key point here, among them certainly, is that there are multiple predicate acts that have been alleged as part of this association-in-fact enterprise, and those multiple predicate acts include more than just wire fraud. It includes money laundering, it includes aggravated money theft,

it includes extortion and grand larceny under the New York Penal Law. And 9(b) does not apply across the board to all of those allegations, and I think for that reason in particular, there's a disconnect in the Defendant's efforts to hold the Plaintiff to a higher level of pleading.

Even if 9(b) applies, the law is also clear that...that information-and-belief pleading is permitted with respect to allegations when those allegations are peculiarly in the Defendant's knowledge, and in this case, I think we have done several things in the complaint, which is, as I'm sure your Honor is familiar, is extremely lengthy, goes through in great detail the allegations with respect to what happened with Mr. Terpin and alleges also that there were numerous other victims going back for a period of multiple years, and when we look at, and when we look at those allegations, those allegations are supported by the assertions that the Defendant and others who are part of this have made allegations about having sums of money that cannot be explained solely from Mr. Terpin's theft.

So this is not a case where we are bootstrapping and we are simply saying this happened now, it might have happened before. The allegations are that this happened to Mr. Terpin, and we've explained in great detail, including dates, including persons, how it happened, but that there are also separate allegations to explain why we believe it happened at other times and we have done the best that we can do to identify those

earlier incidents and talk about those victims, and that is information, those victims is information, that is peculiarly in the knowledge of the Defendant. Indeed, I'm not sure how we can be expected to have identified those victims. Those victims themselves may well not know who stole from them and how it happened. They obviously know that something happened, but even they are likely unaware that the enterprise is the enterprise that did this to them.

And I think for all of those reasons, when you've got allegations that we've included that Mr. Pinsky, for example, has over a hundred million dollars, there has to have been other victims, and we've explained, you know, why we've pled what we've pled and how we did it, and it seems both appropriate and reasonable to be given the opportunity now to proceed with discovery to flesh that out, a task that is going to be made difficult by the other allegations which is Mr. Pinsky was, was directing that evidence be destroyed, so we have a task ahead of us that is going to need to -- that needs to be taken on and that we need the opportunity to proceed with.

I think the other point that's critical and important when considering these RICO claims is that in sifting through the legal standard, the Court has focused on, again, whether it may be a run-of-the-mill fraud claim that's dressed up or whether, as here, we are dealing with inherently unlawful activity, and this is not, this is not a case like Aranov where

you're dealing with an entity, where you're dealing with an entity that is a business. This was set up --

THE COURT: I've got you. Now you're -- I don't mean to cut you off, but, you know, you're arguing things that I think are well covered by the papers. I wanted to give you a chance to reply to anything in the reply brief because you haven't had a chance to do that.

Mr. Biale, do you want to respond to anything that Mr. Blechner says that was not part of your papers?

MR. BIALE: I think that the issues are well covered in the papers, you know, your Honor is well familiar with the legal standard, so we rest on our prior submissions.

THE COURT: All right, let me tell you where I come out, and you should be prepared to either order the transcript or take detailed notes because this really will govern how we go forward.

It's a motion by the Defendant, Ellis Pinsky, to dismiss Plaintiff's First Amended Complaint, which is docket entry 38 -- actually, maybe it's 37. Yeah, it's 37. Which I'm going to call the FAC.

I accept as true for purposes of the motion the facts, although not the conclusions, set forth in the FAC. I know the parties are familiar with those facts; I'm not going to restate them.

Procedurally, the background is the initial complaint

was filed on May 7th of last year. On July 30th, the Defendant requested a pre-motion conference which we held in August. I granted leave to amend. The FAC was filed on October 15th.

I won't take the time to recite the plausibility standard that governs Rule 12(b)(6) motions. We're all familiar with *Ashcroft v. Iqbal*, 556 U.S. 622, and *Bell Atlantic v. Twombly*, 550 U.S. 544.

I do want to put point out that the *Twombly/Iqbal* plausibility standard "does not prevent a plaintiff from pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible." *Arista Records v. Doe*, 604 F.3d 110, 120. Pleading on the basis of information and belief is generally okay and can be desirable and essential when matters that are necessary to complete the statement of the claim are not within the knowledge of the plaintiff. *Boykin v. KeyCorp*, 521 F.3d 202, 215; *See Shulman v. Chaitman*, 392 F.Supp.3d 340, 353, S.D. 2019, and volume 5 of *Wright On Federal Practice & Procedure* § 1224, 3d ed., November 2018 update.

(Off-the-record discussion)

THE COURT: While *Twombly* and *Iqbal* require "factual amplification where needed to render a claim plausible," the Second Circuit "rejects the contention that *Twombly* and *Iqbal*

requires the pleading of specific evidence or extra facts beyond what is needed to make the claim plausible." *Arista Records*, 604, 120-21.

When a complaint alleges fraud, Federal Rule of Civil Procedure 9(b) mandates that the complaint must state with particularity the circumstances constituting the fraud and these allegations ordinarily cannot be pled on information and belief. *Segal v. Gordon*, 467 F.2d 602, 608. Nevertheless, this pleading restriction can be relaxed where the matter alleged is peculiarly within the knowledge of the defendant, so long as the fraud allegations are accompanied by a statement of facts on which the belief is founded. *Watts v. Jackson Hewitt*, 579 F.Supp.2d 334, 351, E.D. 2008, collecting cases. *See DiVittorio v. Equidyne*, 822 F.2d 1242, 1247, which is a pre-*Iqbal* and *Twombly* case, but the principles still apply.

In deciding a motion to dismiss, I can consider, obviously, the facts alleged in the complaint and any documents attached to it or incorporated in it by reference, any document integral to the complaint and relied on in it, information in motion papers if the plaintiff relied on that information in framing the complaint, and any facts of which I can take judicial notice under Rule 201 of the Rules of Evidence. *Weiss v. Ind. Vill. of Sag Harbor*, 762 F.Supp.2d 560, 567, E.D. 2011.

I'm going to start with the RICO claim.

The civil RICO statute makes it unlawful for any

person employed by or associated with any enterprise engaged in or the activities of which affect interstate or foreign commerce to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity...18 U.S.C. § 1962(c). To survive a motion to dismiss, Plaintiff is required to plead, one, a violation of Section 1962; two, an injury to business or property; and, three, that the injury was caused by the 1962 violation. *Kim v. Kimm,* 884 F.3d 98, 103. To establish the violation of 1962, the Plaintiff must plausibly allege conduct of an enterprise through a pattern of racketeering activity. The Defendant argues that the Plaintiff has failed to plausibly allege the existence of an enterprise or of a pattern.

I'll start with the enterprise element.

"A RICO enterprise is a group of persons associated together for a common purpose of engaging in a course of conduct, the existence of which is proven by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *U1it4less, Inc. v. Fedex,* 871 F.3d 199, 205, note 8. The term "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity. That's the definition from Section 1961(4).

Where a complaint alleges an association-in-fact

enterprise, such as alleged by Plaintiff here, a court should examine the "hierarchy, organization, and activities" of the association to determine whether "its members functioned as a unit." *First Capital Asset Management v. Satinwood*, 385 F.3d 159, 174-75; *See McGee v. State Farm*, 2009 WL 2132439, at page 4, note 7, E.D. July 10, 2009, which noted the low threshold for pleading such an enterprise. The existence of an association-in-fact is often times more readily proven by what it does as opposed to abstract analysis of its structure. *United States v. Applin*, 637 F.3d 59, 73. Accordingly, proof of various racketeering acts may be relied on to establish the existence of the enterprise. Again, *Applin*, 73. Thus, although the existence of the enterprise is an element distinct from the pattern of racketeering activity and proof of one does not necessarily establish the other, the existence of an association-in-fact can be inferred from the evidence showing the persons associated with the enterprise engaged in a pattern of racketeering activity, and the evidence used to prove the pattern of racketeering activity and the evidence establishing the enterprise may, in particular cases, coalesce. *Boyle v. United States*, 556 U.S. 938, 947.

I note that Defendant's association to *Boyle* is misleading. Defendant cites *Boyle* for the proposition that its enterprise must have an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it

engages, that's in the Defendant's reply brief at page 9, but *Boyle*, while holding that an enterprise has to have a structure, rejected any requirement that the jury be informed that the structure had to be anything beyond that inherent in the pattern, see 556 U.S., 946-47.

To allege a RICO association-in-fact, the Plaintiff is required to adequately plead only three structural features: one, a shared purpose; two, relationships among the associates; and three, longevity sufficient to permit these associates to pursue the enterprise's purpose. *D'Addario v. D'Addario,* 901 F.3d 180, 100.

Starting with the first requirement, the enterprise has to share a common purpose to engage in a particular fraudulent course of conduct and to work together to achieve such a purpose. *First Capital,* 385 F.3d, 174. There is clear Second Circuit precedent which allows an enterprise to be comprised of a group formed for the sole purpose of engaging in fraudulent activity. *Feinberg v. Katz,* 2002 WL 1751135, at page 12, S.D. July 26, 2002. Here, Plaintiff plausibly alleges that the alleged enterprise had such a purpose, stealing and laundering large cryptocurrency holdings. See, for example, paragraphs 1, 4, 6, 28, 37, 52-55, and 86 of the FAC. Defendant does not seriously dispute this aspect of pleading an enterprise.

Next, an association-in-fact needs only to have

relationships among its associates. It "need not have a hierarchical structure or chain of command, decisions may be made on an ad hoc basis, and on any number of methods...members of the group need not have fixed roles, different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and rules and regulations, disciplinary procedures, or induction or initiation ceremonies." That's *Boyle*, 556 U.S., 948. Accordingly, an association-in-fact enterprise does not require any relationship among the individuals apart from their participation in the affairs of the enterprise as long as facts are alleged tending to make it plausible that the Court is confronted with something more than parallel conduct of the same nature and in the same time frame by different actors in different locations. *Elsevier Inc. v. W.H.P.R.*, 692 F.Supp.2d 297, 306-07, S.D. 2010.

Here, Plaintiff alleges that "a group of young video game players" from the U.S. and Britain, which included Pinsky, Truglia, Accomplices A, B, and C, and Individual X, formed an enterprise in an online user group called "Original Gangsters" or "OGUsers." That's paragraph 37. The FAC also offers specific allegations based on information from Individual X that the members would communicate through Twitter. That's in paragraph 70. Each of the dozen or more members of the enterprise all had particular assigned roles as they allegedly

participated in numerous SIM swaps, hacks, and other schemes in furtherance of their fraudulent purpose of stealing and laundering cryptocurrencies. Specifically, those roles are alleged to include "identifying the victims, obtaining their cell phone and passcode numbers, impersonating and stealing the identity of the victims, conning or bribing mobile phone carriers' employees into giving the imposter a new SIM card, and handing off the personal identity information to the other members of the enterprise who executed the hack and laundered the cryptocurrency holdings into Bitcoins or fiat money in accounts under their own control that could be transferred to anonymous wallets." That's paragraph 30. To bolster this allegation, Plaintiff pleads with particularity the specific roles played by each individual in the theft of his own cryptocurrency via a SIM swap. See paragraph 38. He includes specific factual allegations about how Truglia, in statements to Chris David, described Pinsky recruiting disgruntled employees of mobile carriers to assist in SIM hacks and describes with particularity how Pinsky, Truglia, and other members of the enterprise split up the illicit proceeds from the theft of Plaintiff's cryptocurrency. See paragraphs 58, 60, 63, 76-77.

While the FAC's allegations as to how the members of the enterprise had specific roles in other hacks and schemes are far more general and many of Plaintiff's claims regarding these hacks and schemes are based on information and belief, I find

that these allegations nevertheless satisfy the plausibility standard because, one, any facts concerning other schemes and the exact origins of and roles within the enterprise would be peculiarly within the knowledge of Defendant, and, two, Plaintiff provides a factual basis for these assertions. In addition to the details of the SIM swap of which Plaintiff himself was a victim, he relies on numerous admissions and statements from Pinsky, Truglia, and their associates, as well as evidence of the values of Pinsky's and Truglia's cryptocurrency portfolios which far exceeded the $24 million in cryptocurrency Plaintiff alleges the enterprise stole from him. While it's conceivable that these other hacks by Pinsky and Truglia were not part of the activity of the enterprise, it is plausible that they were.

Plaintiff explains how, based on Plaintiff's investigations, including information from what he describes as several informants, including Individual X who is a former accomplice by Pinsky, and statements made by Pinsky and Truglia to other informants, that's in ¶ 5, he came to believe that these individuals knew each other and coordinated their schemes on the OGUsers forum, and based on these conversations and the roles of each member of the enterprise in his own SIM swap, he alleges that each individual's unique skill set was needed to pull off their crimes with the various pieces working together in concert. Compare *Elsevier*, 692 F.Supp.2d, 307, where the

court noted that an association requires proof of interpersonal relationships, and nothing in the complaint explained how the particular defendants in different parts of the country came to an agreement to act together or even how they knew each other. Contrary to Defendant's argument, the FAC does not merely rely on boilerplate allegations of a relationship among individuals. Instead, it details the roles of the enterprise members in the only hack Plaintiff could reasonably have intimate knowledge of, his own, and provides a detailed explanation of the enterprise's *modus operandi* in that scheme. See FAC paragraphs 38-56, 61-68, 76, 91-94. Plaintiff also includes a specific allegation of at least one other hack perpetrated by the enterprise where "one victim lost all the money set aside for his daughter's college education." That's paragraph 12. Plaintiff also alleges another apparently much larger hack in paragraph 77, but it is only alleged that Defendant participated in it. It is not alleged to be the work of the enterprise. But extrapolating from Plaintiff's own experience, coupled with the admissions of Pinsky and Truglia and information received from the informants, Plaintiff plausibly alleges that, sort of like Danny Ocean and Rusty Ryan organized a diverse set of criminals to pull off a grand casino heist in the *Ocean 11* franchise, Pinsky, Truglia, and their associates organized a criminal enterprise of individuals with the specific skills necessary to conduct large-scale heists of cryptocurrency using computers. See

paragraphs 38-77. *See Barker v. Rokosz*, 2021 WL 1062246, at *9-10, E.D. March 18th, 2021, which found a complaint to properly plead the relationship requirement where it identifies the role of each defendant and the linkages among them; *Cf. Boyle*, 556 U.S., 947, page 4, which noted where individuals independently and without coordination engaged in a pattern of predicates that would not be enough to show an enterprise.

As for the third requirement, an enterprise must have some longevity, since the offense prohibited by the RICO statute demands proof that the enterprise had affairs of sufficient duration to permit an associate to participate in those affairs through a pattern of racketeering activity. *Gucci America versus Alibaba Group*, 2016 WL 6110565, at page 5, S.D., August 4th, 2016. "While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct...nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence." *Boyle*, 948. While Defendant's memorandum points to several cases where RICO enterprises were alleged to exist for several years, he points to no authority for the proposition that such a stretch is necessary for longevity. That's at paragraph 11. Here, Plaintiff sufficiently pleads longevity by, as discussed above, alleging on information and belief, based on circumstantial and direct evidence, that the enterprise operated both before the hack of Plaintiff, that is, beginning in 2015,

and most likely after, up until the time Truglia was charged and identified Pinsky as his accomplice. See FAC paragraphs 53, 56, 61-63, 65, 76-77, and 91-94. For example, according to paragraph 63, Truglia admitted to multiple hacks and described Defendant as his partner with whom he had done hacks the same way they had hacked Plaintiff. Defendant has said that he has been stealing cryptocurrency since he was thirteen years old, according to paragraph 65. In January 2019, a year after Plaintiff was hacked and days after his lawyers had presented a draft complaint to Defendant's lawyers, Accomplice C told Individual X "it's about to be over," suggesting not only that those two were part of Plaintiff's enterprise, but that "it" had been ongoing until that point. This period is of sufficient duration to permit an associate to participant in a pattern of racketeering activity. *Gucci America* at page 5. It may turn out that the enterprise conducted only Plaintiff's hack, in which case the few days in January 2018 would not suffice in all likelihood for longevity, but for now, Plaintiff plausibly alleges an enterprise of sufficient duration, so the requirements for pleading an enterprise are met.

Now, turning to the pattern...

To plead a pattern of racketeering activity, the plaintiffs must plausibly allege that the predicate acts are related and amount to or pose a threat of continued criminal activity. *H.J. Inc. v. Northwest Bell*, 492 U.S. 229, 237-39.

These requirements are known as relatedness and continuity. *Pier Connection v. Lakhani,* 907 F. Supp. 72, 75, S.D. 1995. Defendant does not seem to challenge that the FAC's alleged predicate acts are related, but argues that Plaintiff has failed to sufficiently allege continuity. See Defendant's brief at pages 13-15. That's docket entry 39 by the way.

The continuity element can be close-ended or open-ended, *See AmBase Corp. v. 111 W. 57th*, 785 F. App'x 866, 888, and the Defendant argues that the FAC's allegations do not satisfy the standard for either one.

Close-ended continuity refers to criminal activity stretching over a substantial period of time, generally at least two years, regardless of whether it will continue into the future, *AmBase*, 888. "To satisfy close-ended continuity, the plaintiff must prove a series of related predicates extending over a substantial period of time." *Grace Int'l Assembly of God v. Festa*, 79 F. App'x 603, 506, *cert denied*, 141 S. Ct. 358. Since 1989, the Second Circuit has never found predicate acts spanning less than two years to be sufficient to constitute close-ended continuity. *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 184, a 2008 case, so in that almost twenty-year period. *Spool* explains that the relevant period the court should examine for making the determination of close-ended continuity is the time during which the RICO predicate activity occurred, not the time during which the underlying scheme

operated or the underlying dispute took place. Additionally, while two years may be the minimum duration to find close-ended continuity, the mere fact that the predicate acts spanned two years is insufficient without more to support a finding of a close-ended pattern. *First Capital*, 181. The court has to also consider the number and variety of predicate acts, the presence or absence of multiple schemes, and the number of participants and victims to evaluate whether the pattern was continuing. *Spool*, 520 F.3d, 184.

Here, while the FAC alleges that the enterprise engaged in predicate acts of wire fraud, money laundering, aggravated identity theft, extortion, and grand larceny, the specific and detailed factual allegations underlying those claims all occurred in 2018, spanning a period of a few months as opposed to the minimum period of two years. See FAC paragraphs 9 and 38. While Plaintiff alleges that the enterprise has been in existence since at least 2015, the relevant window for purposes of close-ended continuity is the time during which the predicate activity occurred, according to *Spool*, 184. No predicates relating to hacks other than Plaintiff's are pleaded with the specificity required by Rule 9(b). Accordingly, Plaintiff has not met the pleading standard for close-ended continuity.

I acknowledge that only the fraud hacks have to be pleaded with the specificity required by Rule 9(b), but there

are simply no predicates of any sort pleaded sufficiently other than Plaintiff under the plausibility standard, so I find the Plaintiff has not met the pleading standard for close-ended continuity.

Open-ended continuity can be shown two ways. One is by showing that the enterprise primarily conducts a legitimate business, but there is some evidence from which it may be inferred that the predicate acts were the regular way of operating the business or that the nature of the predicate acts themselves implies a threat of continued criminal activity. *Grace Int'l*, 606. That does not apply here. Open-ended continuity can also be shown where the acts of a defendant or the enterprise are inherently unlawful, such as murder or obstruction of justice, and are in pursuit of inherently unlawful goals such as narcotics trafficking or embezzlement; same case, 606. The hacking activity alleged here is akin to embezzlement, so this type of continuity applies here.

"A threat of continuity exists...where the acts form part of a long-term association that exists for criminal purposes." *U.S. v. Aulicino,* 44 F.3d 1102, 1111. For example, the Second Circuit has found, without discussing the specific period of time involved, that "numerous activities involving bribery and money laundering on behalf of organized crime" which were "part of a consistent pattern that was likely to continue for the indefinite future absent outside intervention" was "more

than ample to establish...continuity." *U.S. v. Coiro,* 922 F.2d 1008, 1017. In so doing, the court held that "where the enterprise is an entity whose business is racketeering activity, an act performed in furtherance of that business automatically carries with it the threat of continued racketeering activity.

Here, like *Aulicino* and *Coiro*, the predicate acts themselves imply a threat of continued criminal activity and the purpose of the enterprise was one that was inherently unlawful, theft and laundering of large amounts of cryptocurrency. *Kalimantano GmbH v. Motion in Time,* 939 F.Supp.2d 392, 407, S.D.N.Y. 2013. Indeed, "an inherently unlawful act performed on behalf of an enterprise whose business is racketeering activity would automatically give rise to the requisite threat of continuity." *Eagle One Roofing Contractors v. Acquafredda*, 2018 WL 1701939, at page 13, S.D., March 31, 2018. This may be true even though the racketeering acts occurred over a short time period. *Kalimantano*, 407. This is distinct from schemes where the alleged racketeering activity was in connection with businesses or endeavors that are not inherently unlawful, where courts generally have not found a threat of continuing activity arising from the nature of conduct alone, even if it extended over longer periods. *Kalimantano*, 407. As noted earlier, Plaintiff has sufficiently, maybe barely, pleaded enough to give rise to a reasonable inference that the enterprise "was an ongoing one that would, absent discovery of the...fraud, have

continued to engage in criminal activity." *International Brotherhood of Teamsters v. Carey*, 297 F.Supp.2d 706, 712 and 716, S.D. 2004, so I find open-ended continuity is plausibly pleaded.

It, of course, may ultimately turn out, after discovery, that the alleged enterprise only engaged in the SIM swaps targeting Plaintiff or in a limited number of them against a specifically-identified set of victims with large crypto holdings and thereafter disbanded. At this early stage, however, I find the Plaintiff has satisfied the pleading requirements for a civil RICO claim, so that claim is going to go forward.

Now I'm going to turn to the common-law claims, and I'll first address the statute of limitations.

Defendant argues that the claims for replevin, conversion, and money had and received must be dismissed as time barred. He says that under New York Law, Plaintiffs claim necessarily arose in Puerto Rico and thus is required to be timely under Puerto Rico's one-year statute of limitations. That's in their brief at page 26. *See Barreto Peat v. Luis Ayala Colon*, 709 F. Supp. 321, 323, D.P.R. 1989, discussing 31 L.P.R.A. § 5298, which is that one-year statute. While Plaintiff's state law claims may very well be time barred, I think it is too early to tell if dismissal on that ground is appropriate absent further factual development for reasons I

will now explain.

The statute of limitations argument on a motion to dismiss will succeed only if it is apparent from the face of the complaint that the claim is time barred. *See e.g. Harris v. City of New York*, 186 F.3d 243, 250. That might be F.2d; I'm not sure. "Generally, because Defendants have the burden of raising an affirmative defense in their answer and establishing it at trial or on a motion for summary judgment, a plaintiff, in order to state a claim, need not plead facts showing the absence of such a defense." *Reach Music v. Warner/Chappell Music,* 2009 WL 3496115, at page 2, S.D., October 23rd, 2009. It, therefore, follows that unless a complaint alleges facts that create an ironclad defense, a limitations argument must await factual development. *Allen v. Dairy Farmers of America,* 748 F.Supp.2d 323, 353-54, Dist. Of Vermont 2020. *See Weisman, Celler, Spett & Modlin v. Trans-Lux*, 2013 WL 2190071, at page 2, S.D. May 21, 2013, which noted that a question of fact as to whether the statute of limitations was tolled is all that's required to defeat a motion to dismiss.

When somebody who is not a resident of New York sues on a cause of action accruing outside New York, New York CPLR § 202 requires that the cause of action be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued. *Global Fin. Corp. V. Triarc,* 93 N.Y.2d 525, 529. "The practical import of § 202 is that it

requires non-resident plaintiffs to file claims by the shorter of the statute of limitations of either, A, New York, or, B, the jurisdiction where the claim accrued (in order to prevent forum shopping by time-barred claimants)." *2002 Lawrence R. Buckhalter Alaska Trust v. Philadelphia Financial Life,* 96 F.Supp.3d 182, 201, S.D. 2015. The FAC does not allege that Plaintiff is a resident of New York and so I have to examine where his cause of action accrued.

A cause of action accrues at the time and in the place of the injury. *Deutsche Bank v. Barclays Bank,* 34 N.Y.3d 327, 336, and when that injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss. *Global Financial,* 93 N.Y.2d, 529, collecting cases.

As I'll get to below when I talk about replevin, the injury here may not be purely economic if one regards the cryptocurrency as personal property. I see no reason, however, why the analysis of where the Plaintiff was injured, in other words, where his cryptocurrency holdings were stolen, and where he felt the impact of that injury would depend on whether the injury is appropriately categorized as purely economic or as a theft of personal property, so the place of injury is where the Plaintiff resides and sustains the economic impact, and, therefore, under New York law, the claim must be timely under the law of the jurisdiction where Plaintiff resides and

sustained the economic impact of the theft of his cryptocurrency.

While the FAC states that Plaintiff is a resident of California, Puerto Rico, and Nevada, and while the Defendant concedes that under New York law a party can have more than one residence, see Defendant's brief at paragraph 27, Defendant argues that I should take judicial notice of a proceeding in the Central District of California concerning the same incidents at issue here where the court held that "Mr. Terpin is domiciled in Puerto Rico and was in Puerto Rico at the time of the incident." That's *Terpin v. AT&T Mobility,* 399 F.Supp.3d 1035, 1047, C.D. of California 2019. I am not going to regard that finding as determinative because there is no indication where the court got the latter fact and Plaintiff disputes it.

Additionally, Plaintiff stated in the filing made in March 2020 that he is "domiciled in Puerto Rico with a residence in California," see 2020 WL 1672741, with no mention of Nevada. Even if I were to take visual notice of this fact, however, I do not think that Defendant has satisfied its burden to show that the complaint alleges facts that "create an ironclad defense." *Allen,* 748 F.Supp.2d, 354.

That statement, and the information Defendant has provided about Plaintiff bragging about how Puerto Rico is his home due to the tax benefits it offers to crypto investors, if true, certainly provide a strong inference that Puerto Rico is

where Plaintiff resides and where the economic impact of the hack was felt and therefore that that is where the claim accrued, but these statements are outside the complaint and do not create an ironclad defense in light of Plaintiff's allegation of a Nevada residence, so we need some further factual development before I can definitively rule.

I would add that the central question of where the claim accrued is not simply where Plaintiff was at the time of the injury, as both parties suggest, but where he resides and sustained the economic impact of the loss. *Global Financial*, 529. That is not apparent from the face of the FAC. At this stage, we know little about the location of Plaintiff's financial base, and I am not going to decide based on Twitter or podcast comments outside the complaint without knowing how or where Plaintiff held his cryptocurrency holdings, where he paid taxes, et cetera. Absent factual development about where Plaintiff's financial base is located, I can't say as a matter of law that the claim accrued in Puerto Rico. *See Lang v. Paine, Webber*, 582 F. Supp. 1421, S.D. 1984, a case where a Canadian plaintiff intentionally maintained a separate financial base in Massachusetts, and under the circumstances, the injury of losing the Massachusetts funds was felt in Massachusetts, not in Canada where the Plaintiff resided, so the motion is denied with respect to the statute-of-limitations defense. I'm sure I'll hear about it again on summary judgment, and because

there's a question of fact as to where the claims accrued, I don't have to reach the issue of whether the Puerto Rico statute of limitations should be tolled. I'm sure I'll hear about that at summary judgment again.

Turning to the replevin claim, replevin "is a remedy employed to recover specific, identifiable items of personal property. A cause of action sounding in replevin must establish that the defendant is in possession of certain property of which the plaintiff claims to have a superior right." *TAP Manutencao v. Int'l Aerospace Group*, 127 F.Supp.3d 202, 211, S.D. 2015.

Defendant argues that the replevin claim must be dismissed because replevin is a remedy employed to recover a specific identifiable item of personal property and that ordinary currency, which Defendant argues includes cryptocurrency, "as a rule is not subject to replevin." *Heckl v. Walsh,* 96 NY Supp. 2d 413, 414, 4th Dep't 2014. Plaintiff, in contrast, argues that his cryptocurrency holdings can be subject to replevin because cryptocurrency is not an "ordinary currency." He argues in his opposition memo, which is docket entry 41, at page 34 that cryptocurrency does not come in the form of physical bills or coins. Funds instead are transferred through an encrypted and decentralized public ledger called 'blockchain,' which records transactions. There are thus circumstances in which cryptocurrency can be traced in a manner that makes it different from ordinary currency. That's the end

of the quote from Plaintiff's brief.

Whether cryptocurrency tokens can be subject to replevin under New York law appears to be a matter of first impression. The purpose of a replevin action is to recover "chattels," which are specifically defined to include "all specific personal property such as, but not limited to, certificates of stock, bonds, notes, or other securities or obligations." That's Section 15 of the New York General Construction Law.

While the Court of Appeals has not addressed the exact question, the statute likely applies to shares of stock that are transferred electronically, as well as physical stock certificates. *See Salonclick v. Super Ego Management*, 2017 WL 239379, at page 2-3, S.D. 2017, which noted a Court of Appeals decision suggesting that electronic data indistinguishable from printed documents can be subject to the tort of conversion because it cannot be seriously disputed that society's reliance on computers and electronic data is substantial, if not essential, and that computers and digital information are ubiquitous and pervade all aspects of business, financial, and personal communication activities, so the statute likely applies to electronically-transferred shares.

In addition, there is authority for defining cryptocurrency as securities in some context, such as unauthorized sales, under the Securities & Exchange Act. *See*

SEC v. Kik Interactive, 492 F.Supp.3d 169, 176, S.D. 2020, which noted that the SEC has determined that cryptocurrency tokens were securities. *SEC v. Telegram Group*, 448 F.Supp.3d 352, 379, S.D. 2020, which granted a preliminary injunction to prevent the planned distribution of digital tokens because there was a substantial likelihood that the SEC would succeed in proving that the plan constituted an unregistered securities offering. And *Balestra v. ATBCOIN*, 380 F.Supp.3d 340, S.D. 2019, which denied a motion to dismiss in a punitive class action, alleging that a company sold unregistered securities through the offering of digital tokens.

There is an argument that just because a sale of cryptocurrency can be considered a sale of a security for purposes of SEC enforcement does not necessarily mean that cryptocurrency tokens are also securities in the sense of specified personal property for a replevin action under New York law. Cryptocurrency tokens have some qualities in common with a security, like a share of stock in a company, and some qualities in common with ordinary currency, which circulates as a medium of exchange, quoting from *Black's Law Dictionary, Black's Law Dictionary*'s definition of currency from the 11th Edition in 2019. As Judge Vitaliano explained in the 2019 decision, cryptocurrency can be defined as just what its name suggests, an encrypted digital currency. *Pogodin v. Cryptorion*, 2019 WL 8165040, at page 1, note 3, E.D. May 14th, 2019, where the court

said "cryptocurrencies are digital currencies...that rely on encryption techniques to secure and verify financial transactions independent of a central issuing or regulating authority." While it is true that cryptocurrencies are "units of computer code" that are "fundamentally private-sector technologies," there is no doubt that they are "used as forms of currency by some private individuals." *Tucker v. Chase Bank*, 399 F.Supp.3d 105, 108, S.D. 2019. Cryptocurrency tokens thus "clearly qualify as money or funds under...their plain meaning definition" and "can be easily purchased in exchange for ordinary currency, acts as a denominator of value and are used to conduct financial transactions." *U.S. v. Faiella*, 39 F.Supp.3d 544, 545, S.D. 2014. *See SEC v. Telegram Group*, 448 F.Supp.3d 352, 358. It said "cryptocurrencies (sometimes called tokens or digital assets) are a lawful means of storing or transferring value." On the other hand, as noted earlier, cryptocurrency is also an investment vehicle that rises and falls in value on grounds other than efforts by the holder.

Ultimately I do not think the question of whether cryptocurrency can be the subject of a replevin action requires that it be considered a security and not currency because even if it is currency, such a claim, in other words, a replevin claim, can be brought to recover "currencies that can be specifically identified, i.e., it consists of specific identifiable coins or bills." *Heckl*, 1996 N.Y.S.2d, 414. Other

district courts have noted how blockchain technology, which relates to how the cryptocurrency is transferred through the encrypted and decentralized public ledger, that Plaintiff notes in his opposition at paragraph 34 "tracks the ownership and transfer of every [token] in existence" and how "every...wallet and the number of [tokens] inside that particular wallet can be identified on the blockchain by referring to its public key." *BDI Capital LLC v. Bulbul Investments*, 446 F.Supp.3d 1127, 1137, N.D. of Georgia 2020, which found Bitcoin to be specific intangible personal property rather than money for purposes of a conversion claim. *Cf. Ox Labs v. Bitpay*, 2020 WL 1039012, at page 6, C.D. of California, January 24th of 2020, which noted that cryptocurrency is tangible property subject to the tort of conversion because it "is not merely an idea that is entirely divorced from any physical form. Rather, it is dependent on blockchain, a public ledger, which records all the transactions." *Kleiman v. Wright*, 2018 WL 6812914, at pages 15 and 16, S.D. of Florida, December 27, 2018, which found Bitcoin to be identifiable enough at the motion-to-dismiss stage to be eligible for a conversion action, and *Currier v. PDL Recovery Group*, 2019 WL 4057394, at page 2, E.D. of Michigan, August 27th, 2018, which described cryptocurrency held on the coin base platform as "intangible personal property." Additionally, while not exactly on point, the Eastern District has found cryptocurrency tokens to be commodities that can be regulated by

the CFTC. *CFTC v. McDonnell*, 287 F.Supp.3d 213, 228, E.D. 2018, which said "virtual currencies are 'goods' exchanged in a market for a uniform quality and value. They fall well within the common definition of commodity, as well as the [Commodity Exchange Act]'s definition of commodities as 'all other goods and articles...in which contracts for future delivery are presently or in the future dealt in.'" At least for now, I agree with these courts that cryptocurrency tokens, even if appropriately categorized as a currency, are sufficiently concrete and identifiable that they may be the subject of a replevin action.

Defendant nevertheless argues that Plaintiff's replevin claim cannot proceed because the FAC does not allege that such property is in the Defendant's possession. That's in Defendant's brief at paragraph 33. *Cf. TAP*, 211, which said that the Plaintiff has to establish that the Defendant is in possession of the property to which Plaintiff claims the superior right. Plaintiff alleges in the FAC that the stolen Triggers and Steem were laundered into Bitcoin and distributed, but that the enterprise may have been unsuccessful in laundering his Skycoin, which thus arguably may still be in Plaintiff's custody or control. See FAC paragraphs 38 and 48-55. Whether these various tokens are still in Defendant's possession, however, is immaterial.

Under New York law "where property is wrongfully taken

by a person or lawfully taken and wrongfully transferred by him or her to another, his or her actual or continued possession at the time of the commencement of the action is not essential to support such an action against him or her on behalf of the party entitled to possession to recover it." *In Re Estate of McLaughlin,* 932 N.Y.2d 188, 190, 3d Dep't 2011. New York courts have consistently held going as far back as the 19th century that a defendant who has parted with property voluntarily and wrongfully is not in a position to deny possession or assert present non-possession as grounds for dismissal, same case, 190, *Accord National Steamship Co. v. Sheehan*, 122 N.Y. 461, 464-65, from 1890, and *Brockway v. Burnap*, 16 Barb. 309, 312-14, a New York Supreme Court case from 1853. Instead of dismissal, "a judgment for possession in a replevin action generally includes an alternative award of a money judgment in the amount of the chattel's value at the time of trial, and the money judgment is collected in the event that the chattel can no longer be found in the defendant's possession." *Sell It Social v. Strauss,* 2018 WL 2357261, at page 7, S.D. March 8th, 2018.

Accordingly, the motion to dismiss the replevin claim is denied.

Turning now to the claim for injunctive relief, Plaintiff's opposition memorandum did not address Defendant's argument in support of dismissal of Plaintiff's claims for a preliminary and permanent injunction, and on that ground, the

claim is properly dismissed, dismissed as abandoned. *Horsting v. St. John's Riverside*, 2018 WL 1916617, at page 6, S.D. April 18th, 2018; *Johnson v. City of New York*, 2017 WL 2312924, at page 17, S.D.N.Y. May 26th, 2017; *Brandon v. City of N.Y.*, 707 F.Supp.2d 261, 268, S.D. 2018; and *Bonilla v. Smithfield,* 909 WL 4457304, at page 4, S.D. December 4, 2009.

So in conclusion, for the foregoing reasons, the motion to dismiss is granted with respect to the claim for injunctive relief and it is otherwise denied. The Clerk of Court should terminate motion number 38. And now we need to talk about discovery.

I assume the parties have not talked about a case management plan because you were awaiting this ruling, so let me ask, I'll start with Plaintiff's side, what does Plaintiff think is a reasonable time frame for fact discovery and expert discovery.

MR. BLECHNER: We haven't had discussions about this for the reasons that you've noted. I would think, though, that if we, if we get started promptly, and we will, that ten to twelve months would be, I think, what we would be asking for, your Honor.

THE COURT: Mr. Biale, what do you think?

MR. BIALE: I also have not had an opportunity to discuss with my colleagues or opposing Counsel this question, so I think we will need to do that. That time period sounds

lengthy to me. I don't know that so much time will be required, but let me confer and then I can report back.

I do want to let the Court know and opposing Counsel know that with respect to when we get started, Mr. Tremonte and I are scheduled to be on trial before Judge Gardephe in a criminal matter October 6th, and so as a result, you know, we are a little bit jammed up on time in the, in the -- for much of the month of September, and I expect that the trial will last approximately two weeks, but after that, we should be in a position to, to proceed.

THE COURT: All right, well, why don't we do this. I'm going to ask Mr. Clark, my deputy, to e-mail you one of my blank case management plans. You two should confer, or three or four, however -- both sides should confer, and see if you can come to an agreement.

I'm sure Plaintiff's Counsel understands that when you've got a trial looming, almost everything else falls by the wayside, so that may be a reason why the discovery period needs to be a little more stretched out than it would ordinarily if you're going to be out of pocket for essentially the next...six or seven weeks, but I'll let you, I'll let you folks confer on that.

And, you know, I would rather set a realistic schedule that you stick to than set an optimistic one that's going to require extensions, so you guys should talk and let me give you

a date because you're lawyers and you need a date for everything. Why don't we say by Friday, September 3rd, you'll submit a, hopefully, agreed-upon case management plan, and if you can't agree, send it with a joint letter explaining your dueling positions and I'll...I'll decide.

What about trying to resolve the case? We can go off the record for a second, although this is a public line so we're -- I don't know if anybody's on it, but we are not speaking privately.

(Off-the-record discussion)

THE COURT: All right, anything else we should do this morning?

MR. BLECHNER: Just to clarify on that last point, your Honor, if we determine that it would be helpful to have a magistrate assist us, do we make a written request for that or should we just get in touch with the clerk or what's the process?

THE COURT: Uh...either way.

MR. BLECHNER: Okay.

THE COURT: Either way is fine.

And also while I have you, let me alert you to a pet peeve of mine regarding the scheduling order that I will enter when you send it back to me, and that pet peeve has to do with requests for discovery extensions that come on the eve of the cutoff or, god forbid, after the cutoff.

I understand that sometimes there are legitimate reasons why you need an extension; the client's in a coma, there was a fire at your law office. Whatever it was, if you have a good reason why you need an extension and you bring it to my attention when you know about it, I am going to be reasonable and you will get your extension, but if you come in at the next conference that's going to be after the close of fact discovery and you tell me, "um, we haven't gotten to depositions yet, you know, we've been working on paper discovery," or if I get a letter, you know, two days before the discovery cutoff to that effect, that's going to tell me you haven't been paying attention to the case because you surely knew before two days before the cutoff that you weren't going to make it, and in that event, I have been known to say, well, that's too bad. If I think you haven't been diligent, if I think you don't have a good reason, I've been known to say no.

You'll see that my case management plan has a procedure you should follow if the other side's not playing ball with discovery. Same principle applies if it's a third party that's not playing ball. That procedure requires you to bring to my attention on a fairly short timeline any bumps in the road with respect to discovery. That's because I want to get involved early and keep you on track. If, you know, we come together at the next conference and one of you tells me, "well, I couldn't depose so-and-so because so-and-so still owes me

documents," I'm going to say, well, so-and-so's in the doghouse for not giving you the documents, but you're in the doghouse for not bringing it to my attention as required, so everybody's out of luck.

I mention this not because I am expecting any problems in this case, I say this whenever I enter a scheduling order or discuss a scheduling order, because once in a while lawyers come in at the next conference and they act surprised that I thought my scheduling order was an order when they took it as a suggestion, so I make it a habit of letting the lawyers know that I have a little bit of a bee in my bonnet about last-minute extension requests or extension requests that don't have a good reason behind them, so now you know.

All right, anything else we should talk about now? All right, I'll take that as a no. Everybody stay well, and I'll look for your scheduling order at the end of the week.

Thank you all. Bye-bye.

MR. BLECHNER: Thank you, Judge.

MR. BIALE: Thank you, Your Honor.

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